

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0832

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE INTEREST OF KIMEO C.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

ALLAN N.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
M. JOSEPH DONALD, Judge. *Affirmed.*

SCHUDSON, J.¹ Allan N. appeals from the trial court order, following a jury trial, terminating his parental rights to Kimeo C. Allan argues:

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

(1) that he "was denied the opportunity to establish a substantial parental relationship with Kimeo C. because of the inaction of the State and the Department of Human Services;" and (2) that termination was not in Kimeo's best interests. This court affirms.

On March 20, 1996, the State filed a petition to terminate the parental rights of Allan N. and Shirley C. to their son, Kimeo C. Kimeo had been under the jurisdiction of the juvenile court pursuant to CHIPS proceedings that began on January 12, 1988, just four days after his birth. The TPR petition alleged that Shirley had abandoned Kimeo, and that Allan had failed to assume parental responsibility as defined by § 48.415(6), STATS. (1993-94).² Shirley failed to appear for the TPR hearings and was found in default. Allan contested the petition and his TPR case was tried before a jury.

On October 29, 1996, the jury, with one member dissenting, found grounds for termination, returning verdicts stating: "Allan [N.] fail[ed] to establish a substantial parental relationship with Kimeo [C.] before the filing of the Termination of Parental Rights Petition although Allan [N.] had reason to believe he was the father of Kimeo [C.]," and "Allan [N.] fail[ed] to assume parental responsibility for Kimeo [C.]" On November 20, 1996, after a two-day dispositional hearing, the trial court concluded that it was in Kimeo's best interests to terminate Allan's parental rights.

Allan first argues that the termination order should be reversed because "[t]hrough no fault of his own, [he] was denied the opportunity to assume his parental responsibilities," and "[h]is actions show that he would have liked to

² All further references are to the 1993-94 Wisconsin Statutes unless otherwise noted.

develop a substantial parental relationship with his child." Allan bases his argument on various assertions contained in his trial testimony, including: that he did not learn of Kimeo's birth until Kimeo was almost three years old; that he was incarcerated at the time he learned of Kimeo; that he attempted to contact courts and the Department of Human Services to express his concern for Kimeo and to determine Kimeo's residence; that from prison, he attempted to initiate an action to establish his paternity, but his papers were returned because they were not in proper form; that while in prison, he received the name of Kimeo's caseworker and, on January 17, 1994, wrote to her;³ and that he received no response to his letter.⁴

Allan's argument elicits some sympathy, particularly given Kimeo's caseworker's failure to respond to his letter. Nevertheless, Allan's argument fails for two reasons.

First, Allan's argument seems to compress the chronology and, in doing so, fails to acknowledge the significance of the substantial period during which he made no efforts to locate Kimeo or establish paternity. As Kimeo's guardian ad litem explains in his brief to this court:

Allan N. found out that Kimeo existed during the winter months of 1990 and 1991. At that time he had "every reason to believe" that Kimeo was his son. Three to four years after becoming aware that Kimeo existed, Allan N. wrote a letter to Renee King, Kimeo's case-worker at the

³ In his four-page letter, Allan stated, "I have long awaited the opportunity to write someone/somewhere about Kimeo. Understandably as the social worker for this case you may feel that that should've been done before now." Allan went on to explain that he believed Kimeo was in the care of relatives. He offered his cooperation and expressed his opposition to anything that would negate or waive his or Kimeo's legal rights.

⁴ Kimeo's caseworker testified that she received Allan's letter but failed to respond. She also testified that the letter was the only communication she received from him.

Milwaukee County Department of Human Services inquiring about Kimeo. Allan N. became aware that Ms. King was Kimeo's case-worker two or three years before writing to her.

Although Allan emphasizes that he "tried to be responsible by first taking care of his criminal appeal before finding Kimeo," this court has located nothing in the record to support that.⁵ In any event, the jury had the opportunity to consider the timing of and any possible justification for Allan's inaction. The jury was instructed that in determining whether Allan had assumed parental responsibility and "[i]n evaluating whether Allan [N.] has had a substantial parental relationship with Kimeo [C.], " it "may consider factors, including, but not limited to, whether Allan [N.] has ever expressed concern for or interest in the support, care, or well-being of Kimeo [C.]"

Second, Allan's argument depends on a faulty legal premise: that "lack of opportunity" is a defense to "failure to assume parental responsibility." In 1988, the legislature amended § 48.415(6)(a)2 and (b), STATS., so that they "no longer require a showing that the father had the opportunity and the ability to assume parental responsibility for the child." *Ann M.M. v. Rob S.*, 176 Wis.2d 673, 683-84, 500 N.W.2d 649, 654 (1993).⁶

⁵ Allan's brief to this court states, "In 1994, his criminal appeal was resolved in his favor, and he wrote a letter to the case worker." Although the record includes Allan's testimony about his release "on the bracelet," it provides neither testimony nor documentation of any criminal appeal proceedings.

⁶ Indeed, Allan did not object to the State's motion *in limine* requesting the trial court to preclude any argument "that the father did not have an opportunity to establish a parental relationship with the child" because "[t]his element of the failure to assume parental responsibility was eliminated" from § 48.415(6), STATS., in 1989. The trial court granted the motion.

Section 48.415(6)(a)2, STATS.,⁷ provides, in part, that "[f]ailure to assume parental responsibility may be established by a showing that a child is a nonmarital child who has not been adopted ..., that paternity was not adjudicated prior to the filing of the petition for termination of parental rights,"⁸ and:

That although paternity to the child has been adjudicated ..., the father did not establish a substantial parental relationship with the child prior to the filing of a petition for termination of parental rights although the father had reason to believe that he was the father of the child and has not assumed parental responsibility for the child.

Thus, even with Allan's most sympathetic spin on the factual background, the statutory criteria were satisfied.

Allan also argues that termination was not in Kimeo's best interests. He contends that "the trial court did not consider whether it would be in the child's best interests to effectively terminate [Kimeo's] ability to know and love his half brother" and, "perhaps in the future, [to] know his father as well."

When a jury finds grounds for termination of parental rights, the trial court must determine whether termination is the appropriate disposition. *See* §§ 48.424(3) and 48.427, STATS. "[T]he trial court 'must consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of the child.'" *Mrs. R. v. Mr. and Mrs. B.*, 102 Wis.2d 118, 131, 306 N.W.2d 46, 52 (1981) (citation omitted).

⁷ Section 48.415(6)(a), STATS. (1993-94), was subsequently amended by 1995 Wis. Act 275, § 13.93, which repealed subsection 2, effective July 1, 1996.

⁸ The parties stipulated that Kimeo was an unadopted nonmarital child and that Allan was adjudicated his biological father following genetic testing performed during the pendency of the TPR proceedings.

The record reflects the trial court's consideration of numerous factors related to Kimeo's best interests. The trial court emphasized that Kimeo had come to have a strong relationship with his foster mother and considered her his parent, calling her "mom." The court referred to psychologist Stephen F. Emiley's report which stated that Kimeo "has psychologically and emotionally thrived under the care of his foster mother. He is clearly attached and bonded to her as the psychological parent." The trial court emphasized that Kimeo's foster mother appeared to be an appropriate adoptive parent. Kimeo's guardian ad litem recommended termination and also advised the trial court that future involvement with Allan could threaten Kimeo's stability. In fact, Dr. Emiley's report stated:

There does not appear to be ... much benefit in pursuing the development of a relationship between Kimeo and his biological father at this time. Given the dynamics, this would be expected to have a, more than likely, deleterious effect on the youngster.

Both Dr. Emiley and the guardian ad litem recommended the foster mother's adoption of Kimeo. Clearly, the trial court lawfully exercised discretion in terminating Allan's parental rights to Kimeo.

By the Court.—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

